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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,
Petitioner,

v.

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Approximately 32,000 of the nation's 40,000 psychiatrists are members. The Association has participated as amicus curiae in the three major Supreme Court cases dealing with constitutional aspects of psychiatric testimony in criminal cases, *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), and *Estelle v.*

Smith, 451 U.S. 454 (1981). The Association has also filed amicus briefs in numerous other cases involving mental health issues, including *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380 (1985), *Mills v. Rogers*, 102 S. Ct. 2442 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979), *Addington v. Texas*, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The American Academy of Psychiatry and the Law is a medical subspecialty organization of psychiatrists involved in the practice or teaching of forensic psychiatry. Founded in 1969, the Academy has just over 1,000 members in the United States, Canada and other countries. Many of these physicians function regularly as forensic experts in criminal cases, performing examinations of defendants, consulting with defense counsel and prosecuting attorneys, and providing trial testimony on such issues as competency to stand trial, legal sanity, diminished capacity and other legal questions requiring psychiatric expertise. The Academy sponsors numerous educational activities and programs, and is engaged in the development of professional and ethical standards of practice for forensic psychiatrists.

Both the Association and the Academy have been actively involved in examining the role of psychiatrists as expert witnesses and consultants in criminal proceedings, with particular attention to both legal and ethical questions concerning the degree of confidentiality and other protections appropriate to psychiatrists' various roles in that setting. Amici are therefore keenly interested in the issues raised in this case, and believe that they can contribute significantly to the Court's consideration of those issues.

The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk.

STATEMENT

Petitioner Michael Marnell Smith stands convicted of the murder and rape of Audrey Weiler on May 23, 1977. Petitioner was tried before a state court jury in a bifurcated proceeding. No substantial effort was made to contest the state's capital charges at the guilt phase of the trial. At the sentencing phase, the prosecution sought imposition of the death penalty pursuant to Virginia's then-new statutory procedure, Va. Code Ann. § 19.2-264, *et seq.* (Cum. Supp. 1977), requiring proof of specified aggravating circumstances. The jury recommended the death penalty and the trial judge imposed that penalty on November 30, 1977.

Petitioner is an indigent who was represented by appointed counsel. Following petitioner's arrest and arraignment and while awaiting trial, the defense requested and obtained three psychiatric examinations. The first examination pertained only to the question of petitioner's competency to stand trial. The second examination focused on the question of petitioner's legal sanity at the time of the charged offenses. The state psychiatrist designated by the court for this purpose advised petitioner in advance of the evaluation that it would not be confidential, and that petitioner's statements could be used against him at trial. This psychiatrist diagnosed petitioner as having an "inadequate personality," but concluded that he was legally sane.

Still wishing to explore potential psychiatric defenses, petitioner's counsel secured court permission for another examination—the one principally at issue in this case. This third evaluation was conducted by Dr. Wendell Pile, a Williamsburg, Virginia psychiatrist. Without advising petitioner of the nonconfidentiality of the examination, Dr. Pile questioned him for an hour about the circumstances and events surrounding the rape and murder for which he had been charged, and also about prior criminal or violent conduct. Petitioner told Dr. Pile of a

previous incident in which he had attempted the rape of a young girl. Petitioner confessed that, while working as a school bus driver, he tore off a girl's clothing and then, having second thoughts about the matter, decided to let her go. Dr. Pile's report to the court and all counsel, diagnosing petitioner as a "sexually deviant sociopath," included the incriminating information about the prior attempted rape. This information had not been previously known to the prosecution.

Petitioner asserted no psychiatric claim or defense at trial, and called no psychiatrists or other experts as witnesses on his behalf. The prosecution, however, called Dr. Pile as one of its own witnesses at the sentencing phase of the trial. Under Virginia's death penalty statute, one aggravating circumstance sufficient to support a jury recommendation of death is a finding "that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. § 19.2-264.2. Over defense counsel's objection, Dr. Pile was permitted to recount petitioner's inculpatory statements concerning the previously undisclosed rape attempt. The jury returned a finding of "future dangerousness," and also found a second aggravating circumstance prescribed by the Virginia statute.[1]

Petitioner's conviction and death sentence were affirmed by the Supreme Court of Virginia on October 6, 1978. 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979). Thereafter, his state petition for a

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[1] Under Virginia law, the jury may recommend a sentence of death either on the basis of a future dangerousness determination *or* if it finds that the defendant's "conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." *Ibid.* As indicated, the jury found that both of these aggravating circumstances were present in this case.

writ of habeas corpus was rejected, and this Court again denied certiorari. 454 U.S. 1128 (1981). Petitioner then unsuccessfully brought a collateral challenge in federal district court pursuant to 28 U.S.C. § 2254. On appeal, the Fourth Circuit assumed, without deciding, that Dr. Pile's testimony for the prosecution should have been prohibited. Relying on this court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983), however, the Court of Appeals affirmed the denial of the petition in view of the fact that the jury's death penalty recommendation was supported, not only by a finding of future dangerousness, but also by a finding of an independently sufficient alternative aggravating circumstance.

INTRODUCTION AND SUMMARY

This Court granted certiorari to review two questions: the Court of Appeals' application of the principle of *Zant v. Stephens*, *supra*, to the facts of this case; and the permissibility of Dr. Pile's testimony in support of the prosecution's request for the death penalty. Amici will address only the second of these questions. Our position is that the admission of Dr. Pile's testimony to establish petitioner's future dangerousness infringed petitioner's rights under the Due Process Clause and the Fifth Amendment.

I. The principal issue on the merits of this case is the scope of an indigent defendant's Due Process right to psychiatric assistance under *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). The *Ake* decision entitles a criminal defendant to a psychiatrist who functions in two capacities —evaluative and consultative. Proper recognition for the first of these functions is sufficient to resolve the instant case. As the Court explained in *Ake*, a criminal defendant in petitioner's circumstances is entitled to the assistance of a psychiatrist providing evaluative services that are "crucial to the defendant's ability to marshal his

defense." *Id.* at 1095. Depending on the circumstances, the psychiatrist may conduct psychological and physiological tests, as well as an extensive oral examination of the defendant and, on the basis of the information derived from these procedures, assist defense counsel in assessing the feasibility of potential psychiatric claims.

If the right to a psychiatrist functioning in this capacity is to have any meaning at all, it must entail restrictions on the prosecution's access to a psychiatrist consulted by the defense. Defense counsel, in short, must be able to *research* his case in a context of confidentiality. If the price of merely exploring a possible psychiatric defense—a defense that, in fact, may never be advanced at trial—is automatic disclosure to the government of the defendant's statements to the examiner, the right established in *Ake* for the protection of defendants will be perversely transformed into a new and potent discovery tool for the prosecution.

It is one thing to permit an expert retained by the prosecution to examine the defendant once defense counsel elects to assert a psychiatric defense and to support that defense with medical testimony. At that point counsel is able to make the difficult choice that the potential benefit from assertion of the contemplated psychiatric claim or defense is worth the risk of disclosing otherwise confidential information to the government, which it may then use to rebut that claim or defense. But it is another thing altogether to say that the prosecution may have full access to a psychiatrist who has been provided under *Ake*, and may use that psychiatrist to testify on any issue the government pleases, where the defense never even gives notice of an intention to interpose a clinically-supported psychiatric claim or defense. Under the latter approach, the price extracted from a defendant for exercising his *Ake* right is so exorbitant as to eviscerate the right.

Respondent's attempt to avoid this reasoning by analogizing a psychiatrist to a "friend" of the defendant is to no avail. To be sure, a criminal defendant who confides in a friend assumes the risk that the friend may reveal the confidences to the police or prosecution. Consistent with the evaluative psychiatric function envisioned in *Ake*, however, the examining psychiatrist here was not in the legal position of petitioner's friend. He could no more reveal petitioner's incriminating statements to the prosecution than could an attorney working on the defense team.

II. Although not directly presented on the specific facts of this case, a closely-related question arises where a defendant *does* interpose a clinically-supported psychiatric claim or defense, but fails to call as witnesses *all* of the psychiatrists whom he consulted in advance of trial. In these circumstances may the prosecution consult with, and call as witnesses, the psychiatrists who are not called by the defense? This is a recurring problem confronting state and federal trial courts and, indeed, will likely arise in this very litigation in the event of a remand for a new trial on the death penalty issue.

We believe that the question must be answered in the negative in view of the second psychiatric function envisioned in *Ake*. In addition to providing expert evaluative services, the psychiatrist to which an indigent defendant is entitled also performs a *consultative* function as a member of the defense team. This separate function includes the provisior of information—information that a medical expert alone is likely to possess—which defense counsel may need in fashioning his strategy with respect to psychiatric issues, preparing his own experts for cross-examination, and preparing to cross-examine the prosecution's medical experts.

The Due Process right to such consultative assistance is rendered meaningless if, simply because the psychia-

trist is not called as a witness by the defense, he is then free to disclose defense counsel's trial tactics to the prosecution. Nor can this objection be overcome by a rule permitting the prosecution to call the psychiatrist as a witness, but prohibiting advance consultation with the psychiatrist. Obviously, cross-examination strategies based on consultations with a psychiatrist will be completely defeated if the psychiatrist turns out to be the government witness whom defense counsel will have to cross-examine. The government's legitimate interests in these circumstances can be fully protected by allowing it to select its own experts to examine the defendant and consult with the prosecutor.

III. If the Court decides that Dr. Pile's testimony did not infringe petitioner's *Ake* right—and *only* if the Court so holds with respect to the principal Due Process issue in this case—then the same testimony should have been excluded under the Fifth Amendment principles of *Estelle v. Smith*, 451 U.S. 454 (1981). To the extent Dr. Pile did not perform confidential evaluative and consultative services for the defense, his role must be viewed as that of an "agent of the State" within the meaning of *Estelle*. His testimony for the prosecution therefore should have been precluded because it consisted of the recounting to the jury of unwarned statements made by petitioner during a psychiatric evaluation.

ARGUMENT

I. DR. PILE'S TESTIMONY VIOLATED PETITIONER'S DUE PROCESS RIGHT TO THE ASSISTANCE OF A PSYCHIATRIST

The issue presented in this case is the price that may be placed on a defendant's exercise of the Due Process right recognized by this Court last Term in *Ake v. Oklahoma, supra.* The petitioner here never asserted a plea of insanity; never asserted any other psychiatric claim at the guilt or penalty phase of his trial; and never sought to present expert psychiatric testimony on his behalf. Nonetheless, his court-appointed psychiatrist, to whom he had revealed incriminating information in the course of a psychiatric evaluation, was permitted to testify as a prosecution witness and disclose that information to the jury. Under these circumstances, the price extracted from petitioner was so great as to nullify his right to the evaluative services of a psychiatric expert.

This Court's decision in *Ake* established that an indigent defendant, no less than an affluent one, is entitled to the assistance of a psychiatrist in cases where an issue potentially involving psychiatric testimony may be "a significant factor at trial . . ." 105 S. Ct. at 1097. Although such assistance has long been provided under federal law, 18 U.S.C. § 3006A, and by most states,[2] the Court held that a defendant's right to psychiatric assistance is constitutionally-compelled under the Due Process guarantee of "meaningful access to justice," *id.* at 1094, and "an adequate opportunity to present [one's] claims fairly within the adversary system." *Ibid.*, quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). "[W]hen the State has made the defendant's mental condition relevant to his criminal

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[2] *See, e.g.*, Cal. Penal Code Ann. § 987.9 (West Supp. 1984); Colo. Rev. Stat. § 18-1-403 (Supp. 1984); Fla. Rule Crim. Proc. 3.216; Ohio Rev. Code Ann. § 2941.51 (Supp. 1983). *See Ake v. Oklahoma, supra*, 105 S. Ct. at 1094 n.4 (and authorities cited therein).

culpability and to the punishment he might suffer," the Court concluded, *id.* at 1095, the assistance of a psychiatrist represents a "basic tool of an adequate defense" that must be provided—at government expense, if necessary. *Id.* at 1094, quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

While "neither approv[ing] nor disapprov[ing] the widespread reliance on psychiatrists. . . ," *id.* at 1096, and the increasing complexity and importance of psychiatric issues in criminal proceedings, the Court acknowledged the "reality" that access to expert medical assistance "may well be crucial to the defendant's ability to marshal his defense." *Id.* at 1095. The Court stressed that psychiatrists serve an essential evaluative function for the defendant and his counsel. They "gather facts, both through professional examination, interviews, and elsewhere. . . ; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior;" and they furnish defense counsel with "opinions about how the defendant's mental condition might have affected his behavior at the time in question." *Ibid.*

If the right to a psychiatrist fulfilling this evaluative function is to have any substance at all, it must entail restrictions on the prosecution's access to a psychiatrist who has been consulted by the defense. To conduct a medically valid examination and to properly assess the validity of potential psychiatric defenses, a psychiatrist must have the trust of the defendant and his attorney. See *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975); *United States ex. rel. Edney v. Smith*, 425 F. Supp. 1038, 1047-48 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir. 1977). An examination of the defendant on the issue of his legal sanity, for example, inevitably will include probing questions concerning the circumstances surrounding the crimes charged as well as circumstances relating to previous antisocial be-

havior. *See* S. Halleck, *Law In the Practice of Psychiatry: A Handbook for Clinicians* 220 (1980); J. MacDonald, *Psychiatry and the Criminal* 47 (1958). As in the instant case, such questions often will elicit incriminating statements and other inculpatory information. Similarly, where the prosecution seeks to prove a defendant's future dangerousness in a capital case, any attempt by the defense to rebut such allegations would almost certainly involve close questioning of the defendant concerning past criminal behavior.[3]

It is obvious that a defendant will be less than candid with a psychiatrist, thereby defeating the purpose of the state-provided evaluation, if the defendant knows at the outset that, merely by electing to *explore* a potential psychiatric defense—one that he may never actually assert—he makes available to the prosecution the substance of his statements to the psychiatrist, and enables the prosecution to call the psychiatrist as its own witness at trial on any issue the prosecution pleases. In this case, the psychiatrist was used by the state to testify on the question of petitioner's future dangerousness. But the issue presented is not limited to that situation alone. Under respondent's apparent view of this case, a psychiatrist appointed at the request of the defense is in the same legal position as a defendant's "friend," to whom the defendant has confided incriminating information. As such, the psychiatrist presumably also would be allowed to testify for the prosecution at the guilt phase of a trial, revealing confessions or other inculpatory statements tending to prove the defendant's substantive guilt.

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[3] The American Psychiatric Association, one of the amici here, argued in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Barefoot v. Estelle*, 463 U.S. 880 (1983), that psychiatric examinations cannot yield reliable predictions regarding a defendant's future dangerousness.

Respondent takes no account of the importance of confidentiality to the evaluative function performed by a defense psychiatrist under *Ake*. At the preliminary stage of a criminal case, before notice has been given of an intention to interpose a plea of insanity or other psychiatric claim, defense counsel must be able to *research* these matters in a context of confidentiality. Counsel must be able to request a psychiatric evaluation of his client, confident that that limited decision, without more, will not result in automatic disclosure to the prosecution of his client's statements to the psychiatrist. If the rule were otherwise, the right established in *Ake* to psychiatric assistance—a right created for the protection of defendants—would be perversely transformed into a potent new discovery device for the prosecution.

Even before this Court's decision in *Ake*, the principle that there exists *some* limitation on prosecution access to a psychiatrist retained by or appointed for the defendant was almost universally recognized. Applying principles of attorney-client privilege,[4] virtually every federal and state court to consider the question concluded that, while a defendant does not have absolute control over the information given to a psychiatrist consulted at his request, government access to that psychiatrist must be denied in the circumstances presented here. *See, e.g., United States v. Alvarez, supra*, 519 F.2d at 1045-47; *Houston v. State*, 602 P.2d 784 (Alaska 1979); *People v. Lines*, 13 Cal.3d 500, 119 Cal. Rptr. 225, 531 P.2d 793 (1975); *Pratt v. State*, 284 Md. 516, 398 A.2d 421 (1979); *People v. Hilliker*, 29 Mich. App. 543, 547, 185 N.W.2d 831, 833 (1971); *State v. Kociolek*, 23 N.J. 400, 412-15, 129 A.2d 417, 423-25 (1957); *People v. Edney*, 39 N.Y.

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[4] Because psychiatric examinations in this context are not usually undertaken for purposes of treatment, the physician-patient or psychotherapist-patient privilege has generally been held to be inapplicable. *See United States v. Alvarez, supra*, 519 F.2d at 1046; *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir. 1983).

2d 620, 385 N.Y.S.2d 23, 350 N.E.2d 400 (1976); *Pouncy v. State*, 353 S.2d 640 (Fla. 1977); *State v. Bonds*, 98 Wash.2d 1, 653 P.2d 1024 (1982); *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982); *State v. Toste*, 178 Conn. 626, 424 A.2d 293 (1979). *But see State v. Carter*, 641 S.W.2d 54, 57 (Mo. 1982) (attorney-client privilege inapplicable to defendant's statements to a psychiatrist retained by defense).

These courts have disagreed regarding the point at which the prosecution may insist on access to such psychiatrists, and the uses to which information secured by these psychiatrists may be put by the prosecution. At minimum, however, virtually every court has agreed that the defendant must give notice of an intention to assert a psychiatric defense before the shield of confidentiality afforded by the attorney-client privilege may be lifted from communications among the defendant, a psychiatrist that he consults, and defense counsel. *See also* C. Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation*, 31 Emory L.J. 71, 128-30 (1982); American Bar Association, *Criminal Justice Mental Health Standards*, § 7-3.2.[5]

To say that *Ake* requires that the defendant have *some* measure of control over prosecution access to the information disclosed in a psychiatric examination and the expert conclusions based on that examination is not to say

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[5] It has also been repeatedly recognized that statements made by a defendant to a psychiatrist in the context of a court-ordered examination may not be used by the prosecution as evidence to prove the defendant's substantive guilt even when such statements may be used to rebut his psychiatric claims. *See, e.g., Gibson v. Zahradnick*, 581 F.2d 75, 78-79 (4th Cir. 1978); *United States v. Reifsteck*, 535 F.2d 1030, 1034 & n.1 (8th Cir. 1976); *United States v. Bennett*, 460 F.2d 872, 878-80 (D.C. Cir. 1972); *United States v. Alvarez, supra*, 519 F.2d at 1042. *See also* Rule 12.2(c), Federal Rules of Criminal Procedure. Most states have codified this restriction in statutes and procedural rules.

that he can block access in all circumstances: the "fair trial" right established in the *Ake* decision need not deprive the prosecution of evidence it reasonably requires to meet its burden in a criminal case; nor is the prosecution placed at an unfair disadvantage if, to effectuate the right to psychiatric assistance, that assistance is subject to a reasonable degree of confidentiality. A fair "state-individual balance," *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), may be struck without resort to the extreme view apparently advanced here by respondent.

To begin with, any psychiatric expert presented at trial as a defense witness obviously will be subject to cross-examination by the government. Thus, to the extent he is aware of information tending to undermine the defendant's claim, that information generally may be elicited by the prosecutor's questions. More importantly, it is well-settled that once the defense gives notice that it will assert a psychiatric defense and present expert testimony to support it, the prosecution may obtain a court order compelling the defendant to submit to a government examination on that same issue. *See, e.g., Battie v. Estelle*, 655 F.2d 692, 701-02 & n.22 (5th Cir. 1981); *United States v. Cohen*, 530 F.2d 43, 47-48 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976); *Karstetter v. Cardwell*, 526 F.2d 1144, 1145 (9th Cir. 1975); *United States v. Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971); *United States v. Weiser*, 428 F.2d 932, 936 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); *United States v. Albright*, 388 F.2d 719, 724-725 (5th Cir. 1968); *Pope v. United States*, 372 F.2d 710, 720-21 (8th Cir. 1967) (*en banc*), *vacated and remanded on other grounds*, 392 U.S. 561 (1968). Whether based on a theory of "estoppel," "waiver" of Fifth Amendment rights, or general principles of "fairness" to the prosecution, the government's reciprocal right of access to the defendant in such

circumstances is clear. See *Estelle v. Smith*, *supra*, 451 U.S. at 465-66 (1981).[6]

Moreover, a variety of sanctions are available to assure that the prosecution's access to psychiatric testimony will be no less meaningful than that of a defendant exercising his *Ake* right. Thus, for example, the defendant's noncooperation with a psychiatrist selected by the prosecution could result in the barring of defense use of expert psychiatric evidence, *see, e.g.*, *United States v. Handy*, 454 F.2d 886 (9th Cir. 1971), *cert. denied*, 409 U.S. 846 (1972), Rule 12.2(d), Federal Rules of Criminal Procedure; prosecutorial comment to the jury on defendant's refusal to submit to an evaluation by a physician hired by the government, *see, e.g.*, Alaska Stat. § 12.45.083 (1980), *Lee v. County Court*, 27 N.Y.2d 432, 442-43, 267 N.E.2d 452, 457-58, 318 N.Y.S.2d 705, 713, *cert. denied*, 404 U.S. 823 (1971); or, in the most extreme case, preclusion of the defendant's psychiatric defense altogether, *see, e.g.*, *United States v. Wade*, 489 F.2d 258 (9th Cir. 1973). See generally Meister, *Miranda On the Couch: An Approach to Problems of Self-incrimination, Right to Counsel, and Miranda Warnings in Pretrial Psychiatric Examinations of Criminal Defendants*, 11 Colum. J.L.& Soc. Probs. 403 (1975).[7]

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[6] *Estelle* itself involved an examination by a psychiatrist chosen by the prosecution to determine the defendant's competency to stand trial. While holding that a defendant could refuse to participate in such an examination if the psychiatrist were free to testify as a prosecution witness at the penalty phase of the trial, the Court stated in *dicta* that a different rule would apply "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony . . ." *Id.* at 465. Similarly, the Court indicated that if a defendant wished to use psychiatric evidence on the question of future dangerousness, he could be compelled to submit to an evaluation by a prosecution psychiatrist on that issue as well. *Id.* at 466 n.10.

[7] By describing the various sanctions that have been applied in these circumstances, we do not mean to suggest that all of them

The key point is that the government's opportunity to obtain relevant psychiatric evidence, and the availability of appropriate sanctions to assure that that opportunity will be provided, are limited in two crucial ways: first, access to the defendant for an examination by an expert chosen by the government is predicated on the defendant's decision to assert a clinically-supported psychiatric claim or defense; and second, the use of information obtained in the course of that prosecution examination is restricted to the specific psychiatric issue that the defense has introduced into the case. *See Estelle v. Smith*, *supra*, 451 U.S. at 468-69 (information learned by prosecutor in competency evaluation is not admissible at capital sentencing hearing).[8] Of course, neither of these limitations was observed here.

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represent reasonable responses to a defendant's failure to cooperate with a psychiatric examination conducted for the government. In our view, the most reasonable sanction would be to preclude the defense from introducing expert psychiatric testimony of its own. Barring the assertion of a psychiatric defense altogether would seem to be disproportionate and unfair. The defendant should not be deprived of the opportunity, where feasible, to attempt to establish his defense through lay witnesses testifying concerning their observations of defendant's bizarre or aberrant behavior. *See, e.g., United States v. Pickett*, 470 F.2d 1255 (D.C. Cir. 1972); *Pouncy v. State*, *supra*. Similarly, at least in certain circumstances, permitting prosecutorial comment on the defendant's refusal to be examined may be inconsistent with this Court's admonition that capital sentencing procedures must be unusually reliable. *See Griffin v. California*, 380 U.S. 609 (1965). *See also Estelle v. Smith*, *supra*, 451 U.S. at 468 n.11.

[8] *See generally* cases cited at note 5, *supra*. This second limitation is subject to the possible qualification that, where a defendant elects to take the stand, information he revealed to the government's psychiatrists may also be used to impeach the defendant's testimony. *Compare United States v. Casteneda*, 555 F.2d 605 (7th Cir.), *cert. denied*, 434 U.S. 847 (1977), *with United States v. Leonard*, 609 F.2d 1163, (5th Cir. 1980). We also recognize that, when a case is tried to a single trier-of-fact, it may be difficult, as a practical matter, to limit the effect of certain testimony. For example, a

In sum, the trial court committed constitutional error in this case by allowing a psychiatrist appointed at the request of the defense to testify at the penalty phase as a witness for the prosecution and, in that capacity, to relate incriminating information bearing directly on the jury's decision to recommend the death penalty. By any reasonable measure, the price thus extracted for petitioner's exercise of his right to psychiatric assistance was so exorbitant as to deprive him of that right altogether.

II. THE PSYCHIATRIC FUNCTION ENVISIONED IN *AKE* ALSO PRECLUDES PROSECUTION ACCESS TO THOSE PSYCHIATRISTS WHO ARE CONSULTED BY THE DEFENSE, BUT NOT CALLED AS DEFENSE WITNESSES

The argument just presented is sufficient to demonstrate that petitioner's sentencing hearing was tainted by constitutional error. However narrowly the *Ake* right to psychiatric assistance may be construed, it must at least prohibit prosecution access to a psychiatrist appointed to consult with the defense when the defendant has neither asserted a psychiatric claim nor chosen to introduce expert psychiatric testimony.

More difficult, and potentially more far-reaching, questions regarding the scope of the *Ake* right arise where the defendant *does* interpose a plea of insanity or other psychiatric claim, and gives notice that he will rely on expert medical testimony to support the claim. Especially in capital cases, a defendant in such circumstances,

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prosecution witness, in disputing a defendant's insanity claim, may testify about certain prior antisocial behavior disclosed to him by the defendant during the course of a psychiatric examination. This inform .cion might later influence the jury's decision on the issue of "future dangerousness" in a capital sentencing hearing even though it would not have been independently admissible at that hearing. Of course, none of these ancillary issues are presented here and we believe that their resolution should await the development of a full factual record.

whether indigent or not, will often seek and obtain examinations by more than one psychiatrist in advance of trial. If, for example, a defendant and his counsel consult with two psychiatrists and decide to call only one of these doctors as a witness, is the prosecution then entitled to access to the psychiatrist who will *not* be called by the defense?

Although this precise question is not raised on the narrow facts of this case, it is a recurring problem confronting trial judges in both state and federal courts and, indeed, is likely to arise in this very litigation should petitioner be given a retrial of the sentencing phase of his case.[9] In any event, it is a question that should be taken into account as the Court attempts, in its decision here, to establish the proper limits of confidentiality with respect to psychiatric experts consulted by the defense. For these reasons, amici urge the Court to address this closely related question in this case. As discussed below, we conclude that the question should be answered in the negative—that is, absent highly unusual circumstances,[10] Due Process principles prohibit prosecution access to psychiatrists who have been consulted by the defense but

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[9] Under the Virginia death penalty statute, the jury may consider mitigating evidence consisting of expert testimony that the crimes were "committed while the defendant [was] under the influence of extreme mental or emotional disturbance," or that, at the time the crimes were committed, "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired." Va. Code Ann. § 19.2-264.4(B)(ii) & (iv). Thus, petitioner's counsel on remand will likely consult psychiatric experts on these issues, as well as the question of petitioner's future dangerousness. Petitioner requested and obtained three psychiatric examinations in advance of the initial trial in this case. There is every reason to expect that, in the event of a new trial on the prosecution's death penalty request, petitioner will again obtain multiple psychiatric consultations.

[10] *See* note 12, *infra*.

are not called to testify as defense witnesses at trial. Any other rule, we submit, deprives a defendant of his right under *Ake* to a psychiatrist functioning in his constitutionally-mandated *consultative* capacity.

The lower courts have confronted this question mainly in the context of claims of attorney-client (and related work-product) privilege. The majority view is that the privilege precludes prosecution access to those psychiatrists who have been consulted by the defense, but are not called as defense witnesses. *See, e.g., United States v. Alvarez, supra; Houston v. State, supra; People v. Lines, supra; Pratt v. State, supra; People v. Hilliker, supra; State v. Kociolek, supra; Pouncy v. State, supra. Cf. United States ex rel. Edney v. Smith, supra* (rule of confidentiality is preferable as a matter of attorney-client privilege, though not constitutionally-compelled).[11]

Under this approach, the confidentiality of all psychiatric examinations is not waived merely by the assertion of a psychiatric defense and the decision to call one psychiatrist, or some psychiatrists, to testify. Consequently, the government may not use the uncalled psychiatrists as prosecution witnesses; nor may the prosecution obtain the uncalled psychiatrists' written reports, diagnoses, or other opinions regarding the accused. This view has been adopted by the American Bar Association. *See* American Bar Association, *Criminal Justice Mental Health Standards* § 7-3.3(b)(A) & (B).[12]

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[11] *United States ex. rel. Edney v. Smith, supra*, and *Noggle v. Marshall, supra*, are the only reported cases we are aware of to have considered this precise issue from a constitutional standpoint, both of them holding that the majority view of the scope of the attorney-client privilege is not mandated by the Fifth or Sixth Amendments. However, these decisions predate *Ake* and did not analyze the issue under the Due Process principles enunciated and applied in that case.

[12] The only circumstance in which the ABA standards would permit prosecution access is where defense counsel, in bad faith,

The contrary, and minority, view is that the defense decision to advance a psychiatric claim or defense, and to do so with the testimony of at least one psychiatrist, waives the privilege with respect to all other psychiatrists consulted by the defense, thus making them fair game for the prosecution. *See, e.g., State v. Carter, supra; People v. Edney, supra; State v. Bonds*, 98 Wash.2d 1, 653 P.2d 1024 (1982). In recent years this approach has also received the support of several commentators. *See* S. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597 (1980); C. Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation, supra.*

While acknowledging that this narrow view of the attorney-client privilege may have a chilling effect on defense examinations, these authorities argue that the majority approach unduly handicaps the prosecution. Since considerable time may pass between the defendant's initiation of psychiatric consultations and his notification of an intention to assert a psychiatric claim, it is argued, the psychiatrist retained by the prosecution will not have access to the defendant when his recollection of relevant events is freshest. A related contention is that the experience gained by a defendant through consultations with his psychiatrists will impair the validity of the government's examination. Having had the benefit of sev-

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has attempted to deprive the prosecution of any meaningful opportunity to meet its burden on a psychiatric issue through a strategy of consulting virtually all available psychiatric experts in the community. *See* Section 7-3.3(b)(ii). Amici agree that this is an appropriate limitation on the extent of confidentiality to be accorded psychiatric experts who consult with the defense. We also note in this regard that an expert should be unavailable to the prosecution only if he has functioned as a *bona fide* consultant to the defense. Defense counsel should not be permitted to engage an expert for a perfunctory and superficial consultation solely for the purpose of barring the government's use of that psychiatrist as a prosecution witness.

eral "friendly" examinations, it is claimed, a calculating defendant will be circumspect in his responses to questions put to him by the government's expert.

Finally, these authorities argue that there is no justification for denying the prosecution access to a psychiatrist who is consulted but not called by the defense in view of the fact that the defendant cannot avoid an examination with another psychiatrist of the prosecution's choosing. The latter psychiatrist can ask the defendant the same questions posed by the psychiatrists chosen by the defense, and the defendant has no choice but to answer, and to answer fully. See pages 14-15, *supra*. That being the case, according to this argument, there is no point in prohibiting prosecution access to a psychiatric consultant whom the defense will not call at trial.

Although this minority view has a superficial appeal, it does not withstand scrutiny when analyzed under the constitutional principles of this Court's decision in *Ake*.

To begin with, the concern regarding timely access to the defendant by a government-retained psychiatrist may be adequately dealt with by measures short of permitting the prosecution to use the defendant's uncalled experts. For example, the defense could be required to give notice to both the court and the prosecution of its intention to obtain a psychiatric examination. The prosecution would then be entitled to subject the defendant to an examination with a government-retained psychiatrist contemporaneously with the initial defense examination. *See* American Bar Association, *Criminal Justice Mental Health Standards*, § 7-3.4.[13] This procedure also responds

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[13] This procedure would have to be coupled with the requirement that the report of the government-retained psychiatrist be filed initially with the court and not the prosecution. Until such time as the defendant actually gives notice of an intention to assert a psychiatric defense and to call expert witnesses on his behalf, the defendant's Fifth Amendment right remains intact and the government has no claim to the information learned by the doctor or con-

fully to the objection that the government is denied an unrehearsed examination if it must wait until after the defendant has been evaluated several times by psychiatrists who have been retained by the defense.

More fundamentally, prosecution access to psychiatrists who are not used by the defense at trial impermissibly infringes the defendant's *Ake* right to a psychiatrist functioning in a *consultative* capacity. *Ake* makes clear that, in addition to the evaluative services discussed in the first section of our brief, the psychiatric assistance to which an indigent defendant is entitled includes expert advice to aid in the "preparation and presentation" of psychiatric defenses, 105 S. Ct. at 1097, and to provide medical information necessary for "preparing the cross-examination of the State's psychiatric witnesses." *Id.* at 1096. Prosecutorial access to psychiatrists who have been consulted by the defense for this purpose creates the grave risk of disclosure to the government of defense counsel's legal strategies and theories—information to which the government has no legitimate claim.

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tained in his written report. Premature disclosure of the report also creates the risk of revealing to the prosecution evidence relevant to the guilt phase of the trial (for example, where the defendant is also asserting a plea of self-defense) or investigative leads. And because the Fifth Amendment prohibits government use of *this* type of information even after the defendant has entered a plea of insanity or other psychiatric defense, *see, e.g., Gibson v. Zahradnick, supra*, 581 F.2d at 78-79; *United States v. Reifsteck, supra*, 435 F.2d at 1034 n.1 (8th Cir. 1976); *United States v. Alvarez, supra*, 510 F.2d at 1052; *Collins v. Auger*, 428 F. Supp. 1079 (S.D. Iowa 1977), the report should be carefully reviewed by the trial judge before it is made available to the prosecution. This is the view endorsed by the American Bar Association. *See* ABA, *Criminal Justice Mental Health Standards* § 7-3.8(a). Alternatively, the court could bifurcate the trial of the case, making the report available to the prosecution after the jury has found that the defendant committed the actus reus, but before the jury has been presented with evidence on insanity or other psychiatric defenses.

Assume, for example, that defense counsel in a capital case, invoking his client's *Ake* right, consults a psychiatric expert for assistance in developing an effective cross-examination of the prosecution's medical witnesses on the question of the defendant's future dangerousness. *See Barefoot v. Estelle*, 463 U.S. 880, 899 n.5 (1983); *Ake*, *supra*, 105 S. Ct. at 1097. It is inconceivable that, simply because the psychiatrist performing this consultative function is not called as a defense witness at trial, he may be consulted by the prosecution and may reveal the line of questioning that defense counsel intends to use in cross-examination.

Nor can this problem be cured with a rule permitting the prosecution to call the psychiatrist as its own witness, but forbidding the prosecution from consulting with him in advance of trial. The psychiatrist, having educated defense counsel on medical and scientific principles relevant to his client's psychiatric claim, and having discussed those same principles in a context designed to assist counsel in preparing an effective cross-examination, cannot be permitted to defeat that strategy by appearing as the prosecution witness whom defense counsel will have to cross-examine.

There are also other instances where a psychiatrist, performing the consultative function envisioned in *Ake*, will be made privy to information that is well within the ambit of protected attorney work product and therefore should remain confidential. In the course of a consultation, for example, defense counsel may raise what he perceives to be shortcomings or vulnerabilities in the psychiatric claim that he plans to present, and may ask the consultant for his opinion on these matters. Or the consultant may suggest that a particular test or inquiry be made—only to be advised by the attorney that there are good reasons not to go down the path proposed.

In short, *Ake* entitles a defendant in a criminal case to the assistance of a psychiatrist fulfilling a particular

role—a consultative role—that necessarily requires the expert to function as a member of the defense team. In that capacity the psychiatrist should no more be permitted to consult with the prosecution, and to reveal defense counsel's strategies and theories, than one of the attorneys representing the defendant. *Cf. United States v. Morrison*, 449 U.S. 361 (1981); *Hoffa v. United States*, 387 U.S. 231, 233 (1966); *Black v. United States*, 385 U.S. 26 (1966) (Sixth Amendment violated where government intrusion into attorney-client communications prejudices defendant through prosecutorial use of information so derived).[14]

Prosecution access to psychiatrists consulted by the defense also interferes with defense counsel's litigation strategy in another way. Although it is possible for the same psychiatrist to serve as a consultant to the defense and to testify as a defense expert at trial, there may be good reasons for defense counsel to rely on different psychiatrists to perform these different functions.[15] Indeed,

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[14] For the same reasons, the prosecution should be permitted little, if any, pretrial access to a psychiatric expert the defense does intend to call as a trial witness. At most, we believe that the prosecution should be permitted to see the psychiatrist's written report, setting forth his findings and opinion.

[15] The adversarial aspect of the consultant's role has no place on the witness stand. As one leading forensic psychiatrist has put it:

> "When he takes the witness stand the psychiatrist becomes a person committed to the process of truth seeking no matter how the truth may conflict with his own ideologies. At this point the psychiatrist should not be reluctant to reveal information that may be adverse to his client's interest. He should never make any effort to embellish his testimony in a manner which leads to even minor distortions of information."

S. Halleck, *Law In The Practice of Psychiatry*, *supra* at 199. Dr. Halleck notes that, properly trained, a psychiatrist can perform both functions in a single case. He also cautions, however, that a psychiatrist sometimes "forgets he is no longer an adversary when he takes the witness stand [and thereby] risks becoming an inferior witness who can easily be embarrassed or humiliated in the course of testimony." *Ibid.*

prudent defense counsel, having the opportunity to consult with more than one psychiatrist, may well seek out an expert who is likely to *dispute* the merits of counsel's contemplated psychiatric claim. A psychiatrist who is doubtful about a particular psychiatric claim may be able to provide more meaningful assistance than a psychiatrist who is supportive of the claim. The defendant's attorney, in other words, should not be forced to seek out the assistance of only those psychiatrists who are thought likely to render an opinion favorable to the accused. Yet, this almost certainly will be the choice of a cautious defense attorney if he knows that any psychiatrist rendering a less-than-favorable opinion is likely to end up testifying against his client at trial.[16]

For these reasons, the Due Process right to psychiatric assistance in criminal cases precludes government access to psychiatrists who have been consulted by the defense and who, for whatever reason, are not called to testify as defense witnesses at trial.[17]

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[16] Prejudice to the defendant in this context is particularly great where the prosecutor, in his summation or direct examination of a psychiatrist not called by the defense, informs the jury that the witness was initially selected by the defendant. *See, e.g., Pratt v. State, supra,* 398 A.2d at 425 & n.4.

[17] Should the Court reject this argument, amici submit that, at a minimum, indigent defendants should be treated the same as nonindigent defendants with respect to attorney-client privilege rules protecting the confidentiality of consultations between a criminal defendant and the psychiatrists he consults. Thus, those jurisdictions extending the attorney-client privilege to psychiatrists who are consulted by the defense, but not called as witnesses by the defense, must afford the same safeguard to indigent defendants who obtain multiple examinations at state expense. Given the importance of this protection, its availability should not be allowed to turn on a defendant's ability to pay for psychiatric assistance.

III. IF THE PROSECUTION'S USE OF DR. PILE'S TESTIMONY IN THIS CASE IS FOUND NOT TO VIOLATE PETITIONER'S DUE PROCESS RIGHTS, THAT TESTIMONY SHOULD THEN BE FOUND TO VIOLATE PETITIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

We have thus far argued that the admission of Dr. Pile's testimony at the sentencing phase of petitioner's trial breached petitioner's Due Process right under *Ake* to a psychiatric expert fulfilling his constitutional role as defense evaluator and consultant. Should the Court reject this argument, however, it then follows that Dr. Pile's testimony should have been excluded because, on the facts presented, it infringed petitioner's Fifth Amendment rights under the principle of *Estelle v. Smith*, *supra*.

Estelle involved a court-ordered psychiatric examination on the question of the defendant's competency to stand trial in a capital case. Despite the ostensibly limited purpose of the examination, the psychiatrist later testified as a prosecution witness at the penalty phase of the trial and, relying on information elicited during the competency evaluation, testified in support of the government's claim that the defendant posed a "future danger"—there, as here, an aggravating circumstance supporting imposition of the death penalty.

The Court ruled, *inter alia*, that, while the defendant could not have remained silent in a competency evaluation properly restricted to that issue, once the psychiatrist "went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of . . . future dangerousness, his role changed and became essentially like that of *an agent of the State*, recounting unwarned statements made in a postarrest custodial setting." 451 U.S. at 467 (emphasis added). Because the defendant's Fifth Amendment right against self-incrimination was

thus fully implicated, the psychiatrist's failure to give *Miranda*-type warnings in advance of the examination precluded the psychiatric testimony at the sentencing phase of the trial.

In our view, the Due Process right recognized in *Ake* entitles a criminal defendant to the assistance of a psychiatrist who, unlike Dr. Pile in the instant case, performs evaluative and consultative functions in a context of confidentiality. Because a psychiatric examination in those circumstances is consensual, our Due Process arguments are concededly inconsistent with the view that the psychiatric examination was subject to Fifth Amendment safeguards. Should the Court reject those Due Process arguments, however, we submit that, for all practical purposes, Dr. Pile must be viewed as having functioned as "an agent of the State" within the meaning of *Estelle*. As such, his testimony at the sentencing phase should have been prohibited because it was based entirely on petitioner's unwarned statements. *See Battie v. Estelle*, *supra*, 655 F.2d at 699-703 (5th Cir. 1981).

If the prosecution may have access to a psychiatrist consulted by the defense even when the defendant has never asserted a psychiatric claim, and may use the psychiatrist to testify on any issue at all, it follows that no right of confidentiality whatever attaches to the psychiatric consultation provided pursuant to *Ake*. Under this approach a defendant's decision to speak to a psychiatrist selected by the defense is no different from a decision to speak to a psychiatrist selected by the prosecution—indeed, for Fifth Amendment purposes it is the same decision since the psychiatrist selected by the defense ends up testifying for the prosecution. That decision, no less than the decision to speak with the psychiatrist in *Estelle*, may not be presumed voluntary in the absence "of procedural safeguards effective to secure the

privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).[18]

To be sure, petitioner here was not under direct compulsion to submit to an examination by Dr. Pile; the psychiatric evaluation was initiated by his attorney and not by the court, as in *Estelle*. However, petitioner was subject to the considerable compulsion confronted by any defendant whose only real chance of defending against a criminal charge is the assertion of a psychiatric defense. This is at least as great as the compulsion that obtains in a postarrest police interrogation, where warnings are, of course, mandatory.

Petitioner's Fifth Amendment right against self-incrimination was thus violated in this case *if* the Court determines that his Due Process right to psychiatric assistance was not. To the extent Dr. Pile was free to recount petitioner's inculpatory statements to the jury, petitioner should have been alerted, in advance, to that potential consequence of the examination.

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[18] Although petitioner's counsel apparently advised him not to discuss prior violent or criminal activity with Dr. Pile, we do not think this general admonition was sufficient to remedy Dr. Pile's failure to give appropriate warnings at the outset of the examination. In *Estelle* the Court's Fifth Amendment and Sixth Amendment holdings were independent of each other. Thus, even if the defendant in that case had had the assistance of counsel in advance of the competency evaluation, the psychiatrist's failure to give warnings to the defendant would still have precluded the psychiatrist's later testimony for the prosecution on the issue of future dangerousness. The same is true here. We believe that an appropriate warning about the lack of confidentiality should be given *by the psychiatrist* at the time of the examination. We note in this regard that the ethics of the psychiatric profession require such disclosures by examining psychiatrists. *See* American Psychiatric Association, *Principles of Medical Ethics With Annotations Especially Applicable To Psychiatry, Section* 3, Annotation 6 (1985).

CONCLUSION

For the foreging reasons, the Court should rule that the admission of Dr. Pile's testimony in the circumstances of this case was constitutional error.

Respectfully submitted,

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